

**U.S. Department of Labor**

Office of Administrative Law Judges  
2 Executive Campus, Suite 450  
Cherry Hill, NJ 08002

(856) 486-3800  
(856) 486-3806 (FAX)



**Issue Date: 21 August 2007**

Case No.: 2007-LDA-00042

OWCP No.: 02-145653

In the Matter of

**V. S.**

Claimant

v.

**USA ENVIRONMENTAL, INC.**

Employer

and

**INSURANCE CO. OF THE STATE OF PENN.**

Carrier

Appearances: JACOB SHISHA, Esq.  
For the Claimant

GROVER E. ASMUS, Esq.  
For the Employer

Before: ADELE HIGGINS ODEGARD  
Administrative Law Judge

**DECISION AND ORDER AWARDING BENEFITS**

This is a claim for benefits under the Defense Base Act, 42 U.S.C. § 1651, et seq., and implementing regulations found at 20 C.F.R. part 704, brought by the Claimant against his Employer and his Employer's insurance carrier. Except where specifically modified, the Defense Base Act incorporates the provisions of the Longshore and Harbor Workers' Compensation Act, ("LHWCA") 33 U.S.C. § 901 et seq., with regard to the payment of medical expenses and compensation for disability of employees engaged in employment outside the United States pursuant to a contract with the United States or an executive department thereof.

I conducted a hearing on this claim on February 28, 2007 in New York City. All parties were afforded a full opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, 29 C.F.R. part 18. At the hearing, Claimant's Exhibits (CX) 1-10 and Employer's

Exhibits (“EX”) 1-18 were admitted (Hearing Transcript (“T.” at 24-26, 71).<sup>1</sup> The record was held open after the hearing to allow the parties to submit evidence that was not yet ready for submission.<sup>2</sup> The parties submitted post-hearing briefs.

In reaching my decision, I have reviewed and considered the entire record pertaining to the claim before me, including all exhibits, the testimony at hearing, and the arguments of the parties.

## ISSUES

The issues before me are:<sup>3</sup>

1. Whether the injury arose out of and in the course of the Claimant’s employment with Employer.
2. The nature and extent of the Claimant’s disability.
3. Whether the Claimant can return to his previous job.
4. If he cannot return to his previous job, whether there is suitable alternative employment for the Claimant.
5. Whether the Claimant has lost earning capacity.
6. The Claimant’s average weekly wage.

(T at 5-8).

---

<sup>1</sup> Claimant’s Exhibit 10 was admitted as demonstrative evidence (T. at 71); The Employer withdrew Employer’s Exhibit 13 (T. at 26).

<sup>2</sup> These items are as follows: Supplemental medical report, Mario D. Kamionkowski, M.D., March 8, 2007 (CX 11); Labor Market Survey, Dr. Gerald K. Wells, March 27, 2007 (EX 11), and a supplemental report from Dr. Wells, dated May 26, 2007 (EX 11A); Transcript of Deposition, Curtis Hightower, February 17, 2007 (EX 16); Curriculum vitae of Edward Robert Rensimer, M.D. (EX 17); Transcript of Claimant’s Deposition, February 5, 2007 (EX 18).

<sup>3</sup> The parties neither stipulated that a notice of controversion had been timely made, nor specifically stated that the Employer’s timely controversion of the claim was at issue. The record reflects, however, that the Employer paid the Claimant for total temporary disability at the purported maximum rate of \$1,047.16 per week from December 8, 2005 to June 29, 2006, a period of 29 1/7 weeks. The Employer suspended payments to the Claimant effective March 15, 2006, but later reinstated those payments. The record contains a Form LS-208, signed by the Employer’s representative, dated July 5, 2006, reflecting all payments made to the Claimant and reporting the final payment. Under these facts, I find that the Employer’s controversion of the Claimant’s claim was timely.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### Stipulations

The parties were able to reach the following stipulations:

1. The parties are subject to the jurisdiction of the Defense Base Act, 42 U.S.C. §§ 1651 et seq.
2. An employer-employee relationship existed.
3. A timely notice of the injury was given by the Claimant to the Employer.
4. The Claimant filed a timely claim.
5. The Claimant has not reached maximum medical improvement (MMI) (T. at 5-8).

These stipulations have been admitted into evidence, and are therefore binding upon the Claimant and Employer. See 29 CFR § 18.51; Warren v. National Steel & Shipbuilding Co., 21 BRBS 149, 151-52 (1988). Coverage under the Act cannot be conferred by stipulation. See Littrell v. Oregon Shipbuilding Co., 17 BRBS 84, 88 (1985). However, I find that such coverage is present here. I have carefully reviewed the foregoing stipulations and find that they are reasonable in light of the evidence in the record. As such, they are hereby accepted as findings of fact and conclusions of law.

### Factual Background and Procedural History

The Claimant is a 27-year old high school graduate and Marine Corps veteran and resident of Ohio. The Employer is a contractor who has held contracts with the Department of Defense for work in overseas locations. In December 2004, after passing a physical examination, the Claimant accepted an offer from the Employer for employment as an ammunition handler in Iraq. The Claimant reported for deployment processing in early January 2005, and arrived in Iraq on January 8. According to the terms of the Employer's employment offer, the Claimant was to be paid \$20.00 per hour (\$30.00 per hour for hours exceeding 40 per week) in the United States and while in a travel status, and \$29.00 per hour (\$43.50 per hour for hours exceeding 40 per week) outside the United States. The work schedule was projected to be six days per week, 12 hours per day.

The Claimant worked in Iraq from the date of his arrival in January 2005 until approximately November 25, 2005. Several days prior his last day of work, he was directed by his supervisor to report to a nearby medical clinic, because the Claimant was experiencing gastrointestinal symptoms (nausea, vomiting, and diarrhea). The local medical personnel transferred the Claimant to a medical facility in Baghdad for further evaluation. From Baghdad, the Claimant flew to the United States and returned to his parents' home in Ohio.

While in the United States, the Claimant sought medical attention from Dr. Mario Kamionkowski, a gastroenterologist, for his medical problems. In early 2006, before treatment was concluded, the Claimant returned to Iraq. However, the Employer did not permit the Claimant to return to work, because the Claimant was unable to obtain a medical clearance. The Claimant then left Iraq again and returned to the United States.

The Claimant filed his initial claim in January 2006. The Employer paid him temporary total disability payments, at the rate of \$1,047.16 per week, from December 8, 2005 to June 29, 2006.<sup>4</sup> The Employer also paid for the cost of the Claimant's medical care with Dr. Kamionkowski, up to the Claimant's last visit prior to the date of the hearing.

### **Summary of the Evidence**

#### **Testimonial Evidence**

##### **Claimant's hearing and deposition testimony** (T. at 29-122; EX 18)

The Claimant testified under oath at the hearing. He briefly recounted that he graduated from high school in 1998, finished two semesters at a community college, and then joined the Marine Corps in 2000. He was trained at aviation ordnance school and was discharged from the Marine Corps in 2004. In December 2004, he accepted the Employer's offer to work as an ammunition handler in Iraq. This was his first civilian job. Before deployment, he passed a physical examination, administered by a physician the Employer chose. The Claimant stated that he did not have any gastrointestinal problems before he went to Iraq, and there was no history of such problems in his family.

The Claimant testified that his job in Iraq consisted of sweeping areas for unexploded ordnance. Working as a member of a team, he gathered the ordnance together, stacked it, and detonated it using C-4 explosives and detonators. He worked six days a week, at least 12 hours per day. The Claimant testified that some of the ordnance had the potential to kill the handlers if it was dropped; he also stated that he was not supervised with regard to what items could or could not be handled safely. He testified that some of the ordnance was scattered from bunkers after combat engineers threw detonating charges inside. The insurgents were able to come in and retrieve the explosives and use them for IED [Improvised Explosive Device] materials. To deny these items to the insurgents, his organization was tasked to discover and destroy what was left. The Claimant stated that the Employer's rules may have required that the ammunition handlers be supervised at all times, but that was not realistic, so he would walk through the ordnance and pick up items. This work required that he be mindful and focused at all times. The Claimant also stated that he dug for ordnance on a regular basis.

---

<sup>4</sup> Under the terms of the Employer's offer, the Claimant was entitled to up to two weeks of time off, without pay, for every 90 days served in Iraq (CX 1/EX 2). Because the Claimant has not asserted that the Employer failed to pay him from the inception date of his disability, I presume that the parties have construed the period from the Claimant's departure from Iraq to December 7, 2005, the day before the first date the Employer paid the Claimant temporary total disability, as unpaid leave to which the Claimant was entitled under the terms of his employment.

The Claimant indicated that he worked with a mobile team, and the team worked pretty much everywhere in Iraq. The food at Camp Wolf was quite bad, and the "KP" tent was shut down. According to the Claimant, the Marines with whom he was working had reported that the food had been rotten and rancid and maggot-infested. The Claimant's team had MRE's [Meals Ready-to-Eat] available most of the time, but sometimes ran out of them. At one point or another, everyone on the team was very sick. The Claimant stated that he recalled that he got sick around June, right after he was at Camp Wolf. He stated that he had continuous diarrhea and that he would vomit every time he ate. He went to see the medic, but did not request any further treatment, because he loved his job, and made great money. The Claimant stated that he knew he would probably not have another opportunity to make such good money, given his education and background. At times, he would be too sick to go to work; all the people in his group also would get sick, and they rotated taking days off.

The Claimant stated that as time went on, his problem got worse. Eventually, his boss, Mr. Hightower, made him go to the doctor. He was vomiting, and everyone knew it, and it was getting to the point where the boss was worried about the Claimant's safety. He went to the doctor at the clinic, and the clinic doctor sent him to Baghdad by helicopter, and then he came back to the United States. The Claimant stated that he believed he got sent home in early to mid December 2005, and arrived in Iraq on January 8 of that year. He did not want to leave Iraq, but he made an appointment with Dr. Kamionkowski, through a family friend, while he was enroute to the United States. The Claimant testified that he went back to Iraq after two weeks in the United States, for tax purposes, and because he wanted to go back to work. He reported to the Employer's offices, and the project manager asked him for a doctor's clearance. The Claimant stated that he did not have one, and he phoned Dr. Kamionkowski. Dr. Kamionkowski told him that if there was no change in his symptoms he needed to come home immediately; the Claimant stated that he returned to the United States.

The Claimant testified that he loved his job in Iraq. Parts of it were stressful, he stated, but he did not feel stressed out. When he returned to the United States, the Claimant stated, his intention was to return to his job. At the Employer's request, he saw Dr. Isenberg, but he continued to receive treatment from Dr. Kamionkowski. The Claimant stated that he received a letter from the Employer's insurance adjuster, Sherry Lusk, informing him he was cleared to go back to work. His Employer no longer had the contract for ordnance disposal, so he attempted to get a job with a different company. The Claimant stated that he called Dr. Kamionkowski and asked him if he had cleared him to return to work; Dr. Kamionkowski told him he had not.

The Claimant then called Dr. Isenberg, who asked him about his symptoms and about the type of work he did. The Claimant stated he told Dr. Isenberg he worked with an ordnance disposal team, but did not tell Dr. Isenberg he took bombs apart. The Claimant testified Dr. Isenberg then told the Claimant that he should not return to work, and he would write another letter to the insurance carrier. After that, Dr. Isenberg wrote the letter dated September 15, 2006 to the carrier. The Claimant stated Dr. Isenberg's letter expressed that the Claimant should not return to his type of employment with his condition, and his condition might go on for a long time. The Claimant testified that this was the first time he had been informed that his condition might be long term.

The Claimant admitted that he told Dr. Kamionkowski, on his initial visit, that he was drinking a lot. He was drinking because he had just returned from a war zone, where there was no alcohol, and he had friends and family visiting every day. Since then, he has tapered his drinking, and it is not a problem. The Claimant stated that, at present, he has periods of several days with no bowel movements at all, and there will be periods of time when he has diarrhea and needs to get to a toilet immediately. He stated that, on two occasions, he has not made it to the toilet in time. The Claimant stated he was recalled to the Marine Corps for an annual muster. He attended the muster and was told that 20,000 troops were being recalled for duty in Iraq and Afghanistan. He provided his medical records to the military, and received a letter stating that he had been released from the reserves.

The Claimant testified his current condition makes it unsafe to do the job he was doing in Iraq. He stated he planned on staying in Iraq as long as possible, and then to make a career out of ordnance disposal in other places around the world. The Claimant stated he arrived in Iraq on January 8 and worked six days per week. He did not get paid for days he did not work. He was paid up to approximately November 20. Based on his pay records, the Claimant testified, he worked more than 276 days, and earned more than \$120,000, including his 401(k) earnings. The Claimant stated that, other than the military, he had never held any other permanent job. The Claimant testified he is not really sure what he plans to do now, and is looking forward to receiving feedback from the rehabilitation counselor to whom the Employer sent him. He is looking forward to going back to work.

On cross-examination, the Claimant discussed his Marine Corps training in aviation ordnance. He stated that he did not attend any military training in bomb disposal or explosive ordnance disposal, but he had some experience assembling aviation ordnance such as bombs, missiles, rockets, and gun systems. Regarding his experience working for the Employer, the Claimant testified his team consisted of three ammunition handlers, three tech IIs, one tech III, a SUXOS [Senior Unexploded Ordnance Technician On Site], a medic, and a safety officer, complemented by an armored security team. The Claimant confirmed that the SUXOS was in charge, and the ammunition handlers were the lowest in the hierarchy. Regarding whether the policies and procedures prohibited him from touching unexploded ordnance unless it had been cleared by a technician, the Claimant stated he was unsure what the rules were, but that was not what happened. The Claimant testified the work orders for handling ordnance changed every day, and agreed the rules were made by people above him. The Claimant testified he would not call himself just a laborer, because there was an element of skill to his job; he acknowledged, however, that his job involved physical labor. He stated if someone felt too sick to work, the person stayed out that day, but was not paid for the day. At some point, everyone on the team got sick. There were no injuries on his team, due to illness, that he knew of. He knew of persons on other teams who were killed.

The Claimant indicated he first became sick in late June, and attributed his illness to bad, maggot-infested food. He did not see any maggots or infestation, but saw food that was all burned. He stated he never knowingly ate bad food, and also indicated he worked through his illnesses, from June to November. The Claimant conceded that if his supervisor had not required him to report for medical treatment, he would probably still be doing his work in Iraq. He

testified Dr. Kamionkowski told him to come home, because he really was not doing any better on the medicines that were prescribed. After he returned to the United States, Dr. Kamionkowski changed his medication to Bentyl, and he felt much better. The Claimant stated he never told Dr. Kamionkowski he was binge drinking on the weekends, but did tell him he drank occasionally on the weekends. The Claimant testified Dr. Kamionkowski never told him that he needed counseling for his drinking, but did tell him to cut down on drinking, and also on caffeine, red meat, spicy food, chocolate, and dairy products. The Claimant confirmed he was still in touch with people he worked with in Iraq, and there were other workers who concealed their illnesses, because they did not want to be sent home, and they continued to work. He also stated there were safety stand-downs because people died on other crews, due to mistakes regarding safety procedures.

The Claimant stated that there have been occasions where he has gone a month or more without having an urgency problem and conceded that when he is not having an urgency problem, his condition is generally stable. He stated he is currently taking several medications, including Prevacid for heartburn. The Claimant conceded he called Dr. Isenberg to discuss with him his opinion that the Claimant could return to work, and that this was after he was told that his compensation would terminate. He also conceded he may have told Dr. Isenberg that he worked for an ordnance disposal team, and they destroyed caches of ammunition; from that, Dr. Isenberg may have deduced that the Claimant dismantled bombs. The Claimant conceded that, in his deposition, he testified he told Dr. Isenberg that his employment involved dismantling bombs. The Claimant also stated he did not tell Dr. Isenberg he had seen Dr. Kamionkowski seven times, as Dr. Isenberg's letter stated, but several times.

The Claimant testified he is living with his parents, is not currently working, and has not really looked for work. He agreed that the wages he earned in Iraq were extraordinary compared with his prior earnings and also stated he was aware that there were ammunition handler jobs available in the United States. However, the Claimant stated, those jobs do not pay as well because they are for fewer hours per week. The Claimant stated he was hoping to go back to Iraq, but is now trying to find out what he can do. He is not aware of any other job he is qualified to do.

In response to my questions, the Claimant confirmed he was not paid for the days he called in sick in Iraq. He stated the Employer lost its contract in Iraq after he was sent home. He stated the majority of his time he was not on "hard bases," which were places that had bathroom facilities. Every day that his team was on the road, the threat of IEDs was present. His team was not escorted by military, but provided its own security, which was embedded in his team; the embedded security for his team was handled by a company that had a contract with the Employer. On redirect examination, the Claimant stated all of the Employer's employees were offered jobs with the company that took over the contract. However, the Claimant did not have a medical clearance to return to work.. The Claimant also testified by deposition, several weeks prior to the hearing (EX 18).<sup>5</sup> In general, the Claimant's deposition testimony covered the same

---

<sup>5</sup> Shortly after the hearing, the Employer submitted the transcript of the Claimant's deposition testimony, accompanied by a Motion to admit the transcript. The Employer's stated reason for offering the deposition transcript was that it "supplements the evidence offered by Claimant at

subjects upon which he testified at the hearing. The Claimant testified that he has not had any vocational training, in any subject, and holds no professional certifications or licenses. He also testified he had been hoping to get back to Iraq, but was beginning to grasp that it might not happen. The Claimant stated he was waiting for a doctor that he trusts to tell him he is medically able to return. The Claimant stated he retained an attorney because he did not know what was going on with his medical situation and Dr. Kamionkowski's letter of August 2006 was written to his former attorney. The Claimant stated he called Dr. Isenberg to ask him why Dr. Isenberg determined he was able to return to his job, even though Dr. Kamionkowski, his own doctor, thought differently. According to the Claimant, Dr. Isenberg asked him about his symptoms and also asked him about his day-to-day work. The Claimant stated he told Dr. Isenberg that he destroyed enemy cache ammunition, a high risk employment which involved dismantling bombs, and also told him that he would not feel comfortable with explosive diarrhea while trying to handle some of the ordnance. The Claimant also stated that he had lined up a job with another company, and he needed a medical clearance for that job. However, he did not send them the letter he got from the Employer's insurance carrier because he called Dr. Isenberg, and Dr. Isenberg changed his opinion.

The Claimant testified that on the first day of a particular job, the team would be briefed by the SUXOS, and then would have a briefing from the safety personnel. The Claimant testified the rules for handling the ordnance changed on a daily basis; sometimes ammunition handlers could do certain things, other times they could not.

The Claimant testified he did not know exactly how he got sick, and did not know if it was food or bacteria in dirty water, or bacteria in the air. He first noticed he was sick at Camp Wolf, where the food was very bad, and there were maggots infesting it. The mess tent was closed down. To his knowledge, the Claimant stated, he did not eat any food that was rancid or had maggots in it. The Claimant stated when he was sick he would experience vomiting after he ate; then he might be constipated for several days, followed by diarrhea for several days, after which he might be all right for several days. This scenario went on for several months, until he was sent home in November. The Claimant stated he was generally able to work, but there were a few days he did not work because of illness. He stated he knew of others who were ill with similar symptoms, but in general people wanted to continue to work. The Claimant testified he does not drink and limits his consumption of alcohol and spicy foods. The Claimant testified he does not feel comfortable doing the work of an ammunition handler because of the risk in handling ordnance that could detonate, under circumstances in which he might have an urgent need to go to the bathroom. The Claimant stated he would not feel safe back in Iraq in his current condition.

---

the Formal Hearing ...." The Claimant did not object to my consideration of the Claimant's deposition testimony. Under the governing regulation, the deposition of a party may be used by any other party for any purpose. 29 C.F.R. § 18.23(a)(3). The deposition transcript was submitted by the opposing party during the period in which the record remained open, and it is permissible for me to consider it; therefore, I will do so.

Mr. Curtis Hightower (EX 16)

In addition to the Claimant's testimony, the February 2007 deposition testimony of Curtis Hightower, a supervisor of the Claimant when he worked for the Employer, was received (EX 16). Mr. Hightower testified he has been working in the field of unexploded ordnance for almost 31 years, and he worked for the Employer in Iraq as a Senior Unexploded Ordnance Technician on site (SUXOS), from 2004 to 2006. He was acquainted with the Claimant, who worked for him as an ammunition handler for almost a year. Mr. Hightower testified an ammunition handler must do everything under the supervision of a qualified technician. An ammunition handler loads and unloads trucks; picks up ordnance he has been directed to pick up and stockpiles it; and can help set up demolitions under the direction of a supervisor. The SUXOS supervises the team leaders, known as Tech IIIs, and tells them the areas that need to be cleared, and where the shots are to be set up. The Tech IIIs in turn tell the Tech IIs and ammunition handlers to gather up the ammunition and get it set up for detonation.

Mr. Hightower testified an ammunition handler is not authorized to dig up live ordnance underground, and is not authorized to dismantle ordnance. In addition, an ammunition handler is not permitted to touch any ordnance unless cleared to do so by someone with the appropriate level of knowledge. He testified an ammunition handler such as the Claimant has no decision-making powers whatsoever, and acts purely as a laborer.

Mr. Hightower stated that much of the ordnance his team dealt with had been in storage, and never had time to arm. It was scattered about, and often had been subjected to an explosion, for example, in a storage facility. Although the ordnance may not be armed, it is still dangerous. He and his crew also went into the magazines where ordnance was stored, and carried it out for demolition. Such ordnance is safer than ordnance that has been subjected to an explosion.

Regarding the Claimant's health condition, Mr. Hightower testified there were rumors the Claimant was ill for a couple of months, but the Claimant continued to work. He stated that he believed the Claimant did not want to leave because the money was so good. Eventually, Mr. Hightower stated, he heard that the Claimant could not retain food, and was having both vomiting and diarrhea, so he told the Claimant to go to the clinic and see the doctor. The Claimant did so, and was given pills, but they were not effective. So Mr. Hightower sent the Claimant back to the clinic and told the clinic personnel to send the Claimant to Baghdad, to the big hospital. The Claimant was evacuated several days later. According to Mr. Hightower, the Claimant was sent home from Baghdad because his vacation was coming up anyway, and the Claimant saw his own doctor at home.

According to Mr. Hightower, the Claimant returned to Iraq, but the Employer would not allow him to return to work without a medical release. Mr. Hightower stated that many of the personnel under his supervision had digestive problems similar to the Claimant's, and testified that the Claimant was able to do his work. In addition, Mr. Hightower stated if there were bathroom facilities near the site where his crew was working, the employee would borrow a truck to go back to the bathrooms, but if it were too far, the employee would just go to the side of the area with a roll of toilet paper. Mr. Hightower stated the concern that the Claimant would be a danger to himself or others if he experienced an attack of urgency while handling ordnance was

not realistic, because ordnance that is in danger of detonating is not moved, but is blown up in place.

On examination from the Claimant's counsel, Mr. Hightower stated that the Claimant was an excellent worker. Mr. Hightower agreed that the Employer's characterization of unique operational challenges in Iraq was accurate, and also agreed that concentration was required to do the Claimant's job, especially when doing sweeps of areas. Mr. Hightower stated he did not know the Claimant's medical limitations, but reiterated the Claimant did his job very well when under his supervision, even while he had been sick for two months.

On redirect examination, Mr. Hightower stated he was not aware whether the Claimant ever picked up ammunition that had not been cleared for him to touch. If Mr. Hightower was aware the Claimant had done so, he would have sent the Claimant home.<sup>6</sup>

### Medical Evidence

#### 16<sup>th</sup> Mobile Army Surgical Hospital Records (CX 3/EX 3)

The parties jointly submitted ten pages of records, dated between November 15, 2005, and November 25, 2005, generated at a military medical facility in Iraq. These records indicate that tests of the Claimant's stool sample showed "rare WBC's [white blood cells] seen" and "few RBC's [red blood cells] seen." On November 24, a differential diagnosis of "peptic ulcer disease vs. atypical irritable bowel disorder was listed" and the Claimant was requested to be evacuated for "formal GI evaluation."

#### Dr. Mario Kamionkowski (CX4/EX4; CX9A/EX14; CX 11)

The parties jointly submitted treatment records from Dr. Mario Kamionkowski, the Claimant's treating physician, as well as reports from Dr. Kamionkowski dated January 2006, August 2006, and January 2007 (CX 4/EX 4), and the transcript of Dr. Kamionkowski's deposition testimony, taken in February 2007 (CX 9A/EX 14). In addition, the Claimant submitted a follow-up report from Dr. Kamionkowski, dated March 2007, based upon a recent examination of the Claimant (CX 11). Dr. Kamionkowski is Board-certified in internal medicine and gastroenterology.<sup>7</sup>

The treatment records indicate that the Claimant first saw Dr. Kamionkowski in December 2005, shortly after his return from Iraq. The Claimant stated his job involved destruction of enemy bombs and caches of ammunition, and the living conditions were precarious. The Claimant reported to Dr. Kamionkowski that he first became ill in August, with vomiting and diarrhea; he also stated he had contact with bad food and had lost about 15 pounds. He underwent minimal testing, which was negative, before returning to the United States. The Claimant stated he was still having episodes of severe nausea, vomiting after meals, and

---

<sup>6</sup> I infer from this statement that Mr. Hightower would have terminated the Claimant's employment.

<sup>7</sup> Dr. Kamionkowski's professional credentials are discussed in his deposition.

diarrhea. The Claimant reported to Dr. Kamionkowski that, since his return, he was consuming six to eight beers per day, and also some rum, but did not drink alcohol in Iraq because it was not available.

Upon physical examination, Dr. Kamionkowski found no abnormalities. He ordered various tests, including stool tests for culture, ova and parasites, and he scheduled an esophagogastroduodenoscopy (EGD) and colonoscopy. The laboratory testing was basically negative. The procedures were performed in December 2005; no abnormalities were discovered. At that time, Dr. Kamionkowski prescribed Librax and advised the Claimant to refrain from drinking alcoholic beverages.

Dr. Kamionkowski's first report, dated January 2006 and submitted to the Employer, stated he could not find a physical basis for the Claimant's ongoing problems. Dr. Kamionkowski recommended the Claimant return to Cleveland to undergo further testing and attempt some treatment for his symptoms. The Claimant was seen in February 2006, at which time he reported to Dr. Kamionkowski that he had intermittent episodes of constipation and diarrhea, but less vomiting. The Claimant also told Dr. Kamionkowski he was drinking less alcohol and had a good appetite. Dr. Kamionkowski's impression was "post infectious irritable colon syndrome." He prescribed Bentyl.

In a return visit in April 2006, the Claimant reported he was feeling better and described himself as 80% improved on Bentyl. He no longer had nausea or vomiting, but had occasional diarrhea if he forgot to take Bentyl. Dr. Kamionkowski continued the Claimant on the Bentyl and told him to follow up in three to four months. In a return visit in August 2006, the Claimant stated he was still having episodes of diarrhea, and Bentyl did not seem to be working anymore. He was also having a lot of heartburn. Dr. Kamionkowski discontinued the Bentyl and started the Claimant on Symax and Prevacid. Several weeks later, the Claimant called Dr. Kamionkowski to say he still was having some ups and downs, but that overall he was feeling better. He was advised to continue on the same program.<sup>8</sup>

In a report dated August 2006, to the Claimant's then-counsel, Dr. Kamionkowski stated his diagnosis of the Claimant's condition was "post infectious irritable colon syndrome" and stated treatment was one of dietary management and avoidance of alcoholic beverages. Dr. Kamionkowski also stated: "It is very difficult to ascertain the prognosis with any degree of approximation due to the unpredictability of this condition. The patient may have long terms of relapses and remissions. Given his present symptoms, it would not be advisable for him at this point to return to his previous employment as a civilian munitions specialist in Iraq. He will have certainly a number of restrictions in terms of diet and the need to continue certain medications."

---

<sup>8</sup> The treatment notes relating to the August 2006 visit and phone call appear only in the Employer's exhibits (EX 4).

Dr. Kamionkowski's January 2007 report, to the Employer's insurance carrier representative, consists of his response to Dr. Rensimer's report. Dr. Rensimer is an infectious disease specialist whom the Employer consulted regarding the Claimant's case.<sup>9</sup> In general, Dr. Kamionkowski disagreed with Dr. Rensimer regarding the cause of the Claimant's condition, and pointed out that the stool samples taken in Iraq showed both white blood cells and red blood cells present, which is extremely uncommon in normal individuals. When the amount of time between the Claimant's onset of symptoms and the testing done in Iraq is taken into consideration, Dr. Kamionkowski asserted, one cannot say for certain that the Claimant did not have a bacterial infection. Dr. Kamionkowski also stated he cannot rule out an infectious etiology to the Claimant's irritable colon syndrome, and disagreed with Dr. Rensimer that irritable bowel syndrome is a diagnosis of exclusion. Dr. Kamionkowski also indicated anticholinergics (such as dicyclomine) sometimes do help with nausea and vomiting, and it has been his experience that bulking agents do promote better function in patients with irritable colon syndrome, whether they have diarrhea or constipation.

In sum, Dr. Kamionkowski stated, the Claimant has irritable bowel syndrome, (IBS) but he could not clearly determine the etiology, and could not rule out an infectious component as the trigger.<sup>10</sup> Regarding the Claimant's return to work on limited duty, Dr. Kamionkowski stated that his condition was more than a medical annoyance. According to Dr. Kamionkowski, the unpredictability of the condition under stressful situations could be jeopardizing the Claimant's safety, and it would be dangerous for others to be around someone who could not complete his work of disposing of explosives because of the sudden urge to evacuate his bowels. Dr. Kamionkowski indicated the Claimant's condition was a "benign nuisance" in a normal environment, but destroying explosive items in Iraq is not a normal environment, and the Claimant's condition cannot be readily corrected by ample supplies of water or the availability of large quantities of toilet tissue, as Dr. Rensimer had asserted.

In his post-hearing report, dated March 2007 and addressed to Claimant's counsel, Dr. Kamionkowski stated that the Claimant reported having intermittent episodes of unpredictable and unexpected diarrhea with some level of urgency, and his physical examination of the Claimant was negative. Dr. Kamionkowski stated that the Claimant "is certainly not, at this current time, well enough under control to return to Iraq to his previous work and the disposal of enemy ordinance" (sic) (CX 11).

In his deposition, upon examination from the Employer's counsel, Dr. Kamionkowski discussed his medical treatment of the Claimant and the reports generated from that treatment. Regarding his recommendations that the Claimant not continue his work in Iraq, Dr. Kamionkowski stated the Claimant had an irritable colon, and people with irritable colons can have finicky digestive systems affected by eating, living conditions, environmental stress, and so on. Therefore, it was not advisable for the Claimant to go back to Iraq to resume the type of work he was doing. Dr. Kamionkowski stated he perceived that the Claimant was collecting

---

<sup>9</sup> Dr. Rensimer's reports are also in the record (EX 6) and will be discussed below.

<sup>10</sup> I infer that the terms "irritable colon syndrome" and "irritable bowel syndrome" are interchangeable. For the sake of consistency, I will refer to the Claimant's condition as "irritable bowel syndrome" or "IBS."

explosives and ammunition and piling it up and blowing it up, and such activity necessarily involves some degree of risk and requires full concentration. In addition, no matter what type of work the Claimant was doing, the conditions of living in Iraq are stressful, and Iraq is not the environment for someone with an irritable colon.

Dr. Kamionkowski also testified that he discussed the Claimant's alcohol consumption with him, and the Claimant said he was drinking less. If he had continued to see the Claimant and the Claimant did not improve, Dr. Kamionkowski stated, he would have referred him for psychological counseling, because that is part of the global treatment for irritable colon. Dr. Kamionkowski stated he thought the Claimant was making considerable progress until the August 2006 visit, when he switched the medications; the Claimant has not seen him since then, but has reported he was feeling better with the new medications. Dr. Kamionkowski testified he does not see any problems with the Claimant working in Cleveland, but would advise the Claimant to stay away from Iraq until his physical condition was settled and under control. His concern about Iraq was that it is a war zone and is stressful for the Claimant, given his condition. As Dr. Kamionkowski stated, "I don't care where he works. I just think the kind of work that he was designated to do in Iraq, under the conditions that people are living in Iraq today, I don't think that's the environment for somebody with an irritable colon. Whether it's blowing up ammunitions or just to stay at the Hilton Hotel in Baghdad, that's not the place [for him] to be" (CX 9A/EX 14 at 48).

On examination from the Claimant's counsel, Dr. Kamionkowski stated he noted the testing done in Iraq in November 2005, three to four months after the onset of the Claimant's symptoms, showed some red blood cells and white blood cells. This is not normal. Dr. Kamionkowski also stated that in most patients with irritable bowel syndrome, there are no anatomical abnormalities. Dr. Kamionkowski stated the medical community is beginning to recognize that a significant segment of the population of irritable colon patients have a history of having had an acute gastroenteritis or an infectious process. He also stated weight loss is associated with gastroenteritis or food poisoning, but is not associated with irritable bowel syndrome, and remarked that the Claimant's gastroesophageal reflux was interrelated with his bowel syndrome. Dr. Kamionkowski's opinion was that the Claimant's condition was temporally or causally related to his working in Iraq, and it would be risky for him to return to Iraq, even if his condition were to go into remission.

On re-direct examination, Dr. Kamionkowski testified the Claimant had made significant improvement; however, he could not state the Claimant had attained maximum medical improvement. He stated the Claimant's medical test results in Iraq were significant, as they supported the hypothesis that the Claimant had some kind of acute gastroenteritis.

Dr. Gerald Isenberg (CX 5/EX 5; CX 9B/EX 15)

At the request of the Employer's insurance carrier, Dr. Isenberg evaluated the Claimant in May 2006. He submitted a medical report to the insurance carrier's representative shortly after his evaluation, and submitted supplemental reports in June and September 2006 and in

January 2007. These reports were submitted jointly by the Claimant and the Employer (CX 5/ EX 5). Dr. Isenberg is Board-certified in internal medicine and gastroenterology.<sup>11</sup>

At the time of Dr. Isenberg's initial evaluation, the only records available to him for his review were Dr. Kamionkowski's report of January 2006 and the laboratory results from the Claimant's medical tests in Iraq in November 2005. Dr. Isenberg conducted a physical examination, including a review of systems, and took a medical and family history. According to Dr. Isenberg, the Claimant told him he developed symptoms in Iraq in May or June 2005, after eating bad food, when he developed nausea, vomiting, abdominal pain, and diarrhea mixed with blood, and he lost approximately 27 pounds. The Claimant reported he was initially placed on Librax by Dr. Kamionkowski but was subsequently changed to dicyclomine, and also advised to use Metamucil.<sup>12</sup> The Claimant stated to Dr. Isenberg that he no longer had vomiting, but still had intermittent episodes of diarrhea and constipation.

The Claimant's physical examination and review of systems were normal. Dr. Isenberg concluded the Claimant's current symptoms of diarrhea alternating with constipation were consistent with a diagnosis of post infectious irritable bowel syndrome, and remarked it was unusual for dicyclomine to resolve nausea and vomiting. Dr. Isenberg opined it was not possible to predict how long the Claimant would have symptoms, and it was possible that the Claimant would continue to experience them on an intermittent and unpredictable basis.

In June 2006, by letter, the Employer's insurance carrier contacted Dr. Isenberg and requested he provide information on whether the Claimant was capable of returning to work, with or without restrictions; whether the Claimant had reached maximum medical improvement; and whether the Claimant suffered any type of permanent disability. Dr. Isenberg responded promptly by letter. In his response, he stated the Claimant was capable of returning to full, unrestricted work activity, and the Claimant may attain maximum medical improvement in the future. Dr. Isenberg also remarked that the Claimant's condition is a waxing and waning syndrome, with good and bad days, but he did not believe the Claimant would have any type of permanent disability or impairment.

In September 2006, Dr. Isenberg sent an additional report to the insurer. The circumstances that prompted this report are not apparent from the written record. In this report, Dr. Isenberg stated the Claimant informed him he had seen Dr. Kamionkowski at least seven times for his condition, and that he had an episode in which he had diarrhea and had to rush to the bathroom urgently. The Claimant told Dr. Isenberg he was concerned that if he had a spell with an urgency episode while engaged in his ordnance disposal job, that could be very dangerous. Dr. Isenberg then stated, given the Claimant's high risk employment, an episode of diarrhea with urgency would impair the Claimant's ability to do his job. Dr. Isenberg also stated it was more likely than not that the Claimant's condition will persist for at least the next decade or so, although it is unpredictable, and he recommends the Claimant not return to this type of employment.

---

<sup>11</sup> Dr. Isenberg's professional qualifications are summarized in his deposition testimony.

<sup>12</sup> Dicyclomine is the generic name for Bentyl. See  
<http://www.nlm.nih.gov/medlineplus/druginformation.html>.

In January 2007, Dr. Isenberg submitted a medical report to the insurer's representative, responding to the statement of Dr. Rensimer. (Dr. Isenberg's letter states that it was in response to "your infectious disease physician's letter"). Dr. Isenberg disagreed with Dr. Rensimer regarding the Claimant's diagnosis, and stated there is an extensive body of medical literature regarding post-infectious irritable bowel syndrome. Dr. Isenberg also stated the Claimant has a high-risk occupation, and the Claimant would place himself and others at risk if he were to experience a bout of fecal urgency, which could cause him to lose his concentration and become distracted in dismantling explosives.

Dr. Isenberg also testified by deposition, in February 2007, and the parties jointly submitted the transcript of his deposition testimony (CX 9B/EX 15). In his deposition, which in general repeated the substance of his written reports, Dr. Isenberg testified that dicyclomine is not used to treat nausea and vomiting, and he would not expect that drug to resolve those symptoms. He also testified the Claimant told him he had not abstained from alcohol use and had been binge drinking on the weekends. Dr. Isenberg testified the Claimant most likely has post-infectious irritable bowel syndrome; he based this impression on the history of the Claimant's gastroenteritis in the past. In addition, the white and red blood cells in the Claimant's stool, as found by the military medical testing, suggested that the Claimant could have had an infectious process. Dr. Isenberg stated he considered a diagnosis of celiac sprue, but that is highly unlikely given the Claimant's symptoms of alternating diarrhea and constipation. Dr. Isenberg also testified the Claimant had not reached maximum medical improvement, because he was still experiencing irritable bowel symptoms.

Dr. Isenberg testified his letter of September 2006 was written because the Claimant contacted him to inform him that he had been having some troubles with his diarrhea and had some episodes of urgency, especially around the July 4 holiday. Dr. Isenberg stated the Claimant did not tell him why he had called; Dr. Isenberg did not specifically recall whether the Claimant had asked him to write a report, but Dr. Isenberg stated the Claimant probably did, because the addressee on the September 2006 letter is not the same person to whom his earlier letter was sent. Dr. Isenberg also testified that the Claimant told him that he was concerned about how episodes of urgency would affect his ability to do his job, which was described as dismantling live bombs. Dr. Isenberg testified that stress exacerbates problems with fecal urgency and dismantling bombs is a stressful occupation; consequently, the Claimant's IBS condition might prevent him from doing his job. Dr. Isenberg also stated if the items the Claimant were handling had been previously determined to be safe, he should be able to perform his job.

On examination by the Claimant's counsel, Dr. Isenberg stated he would not recommend that the Claimant handle a live explosive that could detonate upon being dropped, because if he had a stress-induced rectal urgency, he would create danger for himself or others. Dr. Isenberg also stated gastroenteritis can precipitate the development of irritable bowel syndrome. Finally, Dr. Isenberg also stated that the Claimant has a better prognosis than other patients with irritable bowel syndrome, but a significant percentage of patients will experience symptoms for years.

Dr. Edward Rensimer (EX 6, 17)

At the request of the Employer, Dr. Rensimer, who is Board-certified in internal medicine and infectious disease and holds a certification in travel medicine and travelers' health from the American Society of Tropical Medicine and Hygiene, reviewed medical records relating to the Claimant in September 2006 and issued a written report. The medical records Dr. Rensimer reviewed were forwarded to him under cover of a two-page letter from the Employer's insurance carrier's representative; this letter provided background information about the onset of the Claimant's symptoms and his course of treatment, and posed a series of questions for Dr. Rensimer's response.<sup>13</sup>

Dr. Rensimer's report reflects that he reviewed Dr. Kamionkowski's records from December 2005 to January 2006 and report of August 2006; Dr. Isenberg's report of May 2006; and the records generated by the military medical facility in Iraq.<sup>14</sup> In addition, Dr. Rensimer met with the Employer's carrier's representative, presumably to discuss the Claimant's case.

In his report, Dr. Rensimer stated it was not consistent for the Claimant to have normal laboratory results, if the lab samples were obtained at the time of an active gastrointestinal affliction. He also stated that it was possible that the Claimant's irritable bowel syndrome was not related to the Claimant's service in Iraq, and commented this was a diagnosis of exclusion. Dr. Rensimer also commented the dosage of dicyclomine prescribed to the Claimant would be unlikely to produce any effect, given the Claimant's weight, and in any event, would be unlikely to give relief to the Claimant's nausea and vomiting.

Dr. Rensimer stated that there was no evidence, from the medical tests, of an infectious origin to the Claimant's condition. He stated if the Claimant had severe nausea, vomiting and diarrhea from a cause other than irritable bowel syndrome for six months prior to the tests Dr. Kamionkowski performed, there would more than likely be changes in the intestinal linings. Irritable bowel syndrome might show nothing; however, he stated, the Claimant's symptoms were "highly atypical for IBS." Dr. Rensimer opined the Claimant's hiatal hernia and gastroesophageal reflux (GERD) could account for upper abdominal pain and for nausea and vomiting, but not diarrhea and constipation.

In addition, Dr. Rensimer concluded it could not be determined whether the Claimant's condition was related to the ingestion of rancid food, because too much time had passed to find active evidence of pathological effects in the Claimant's body. Dr. Rensimer also remarked that ingestion of alcohol can affect the bowel.

---

<sup>13</sup> Some of the information in the representative's letter was not entirely accurate. For example, in addition to stating that the Claimant's tests in Iraq were normal, the representative told Dr. Rensimer that the Claimant alleged he was totally disabled. The record does not support this statement.

<sup>14</sup> Dr. Rensimer also reviewed several items that are not in the record before me, including the "disability case notes" from the Employer's carrier's representative and a "confidential final report" from MJM Investigations, Inc., dated March 2006.

Dr. Rensimer diagnosed the Claimant as having irritable bowel syndrome (IBS), as well as a possible psychosomatic disorder. He also remarked that it is speculated that bowel infections may precede and cause some cases of IBS, but this premise is not easily proved. Regarding the Claimant's ability to work full unrestricted duty, Dr. Rensimer stated that there is nothing about IBS that impairs physical strength or mobility or mental function. He characterized the condition as "at worst a medical annoyance, reasonably controlled with benign, well-tolerated medications." Dr. Rensimer stated that the Claimant, with dietary prudence, occasional medications, and avid, assiduous attention to fluid intake will minimize discomfort, and remarked that even in isolated locations, adequate fluid support and readily available supplies of toilet paper will make him fit to work..

In sum, Dr. Rensimer stated, the Claimant "has a subjectively based nuisance malady with no significant risk to his or others' well-being and no impairment that will compromise his job performance significantly, if he has the will to do it. Many patients work comparable jobs with far worse medical problems. He should return to unrestricted duty as soon as possible." Dr. Rensimer also commented that the Claimant's "insistence on what is a marginally significant subjective medical problem" as the source of a disability was, in Dr. Rensimer's opinion, "an extreme position that suggests an adjustment or personality disorder than may be linked to neurosis, anxiety, depression, obsessive-compulsive ideation, or a combination of these functional disorders that very well could contraindicate remote work duty under conditions of social deprivation, emotional stress, and physical challenge...."

#### Documentary Evidence

The parties also submitted several items of documentary evidence. These are summarized below.

#### Personnel and Pay Records (CX 1/EX 2; CX 6/EX 7; CX 7; EX 8; EX 9)

The parties jointly submitted 43 pages of the Claimant's personnel records, maintained by the Employer (CX 1/EX 2). These records include the Claimant's job application and associated documents (such as a copy of his official document showing his discharge from the Marine Corps in April 2004); the Employer's offer to the Claimant; a job description, signed and acknowledged by the Claimant; and explanations of the Employer's personnel policies, wages and benefits. Also included are a "work status report" reflecting the results of a medical examination that the Claimant underwent, at the Employer's request, on December 10, 2004, and a medical questionnaire the Claimant completed at the time he accepted the Employer's offer of employment. The "work status report" states that the Claimant was cleared for overseas travel to Iraq; the Claimant's medical questionnaire reflects that he slipped a disc in his lower back in 1997 and was treated for bronchitis in 2003, but otherwise indicated no adverse medical history. The job description for "ammunition handler – overseas location – Iraq" states that an ammunition handler will report directly to and will take direction from an ammunition manager. An ammunition handler is also required, among other things, to "implement procedures for the safe handling, transport, inventory and inspection of Ammunition, and coordination of these procedures with USA's Ammunition Manager;" "implement Internal/External SOPs [standard

operating procedures], as required to support operational requirements;" and "implement Site Safety Procedures for the handling, storage, transportation and inspection of ammunition items."

The Employer also submitted job descriptions for other jobs on munitions disposal teams, including the SUXOS [Senior UXO Supervisor] and UXO Technicians II and III (EX 9). These job descriptions establish the responsibilities for these positions, and describe the duties regarding the identification and disposal of unexploded ordnance.

The parties jointly submitted records of the Employer's wage payments to the Claimant (CX 6/EX 7).<sup>15</sup> The pay records reflect that the Employer paid the Claimant a total of \$126,098.51 in 2005. This amount included \$14,000 that was placed in the Claimant's 401(k) account. The Claimant also submitted copies of pay stubs (CX 7). These are consistent with the Employer's records. The Employer also submitted a portion of the Claimant's Social Security statement that included a listing of the Claimant's lifetime earnings, broken down by year (EX 8). For the years 2000 through 2004, respectively, the Claimant's earnings are listed as follows: \$10,644; \$14,372; \$17,483; \$20,884; \$8,812.

#### Miscellaneous Items of Documentary Evidence

The parties jointly submitted several pages of documents relating to the Claimant's attendance at a Marine Corps muster in November 2006 (CX 8/EX 12). These documents establish that, in December 2006, the Claimant was recommended for discharge from the Marine Corps reserve due to medical reasons.<sup>16</sup>

The Claimant submitted approximately 20 color photographs depicting his team's operations in Iraq (CX 2). Included are photographs of various types of munitions, shown both as discovered by the team and after collection and preparation for disposal. The Claimant referred to these photographs in his hearing testimony and at his deposition.

The Employer submitted copies of documents from its administrative files pertaining to the Claimant's claim (EX 1). This Exhibit includes copies of the Claimant's claim (Form LS-203), dated January 19, 2007; the Employer's Form LS-206, dated March 3, 2006, showing payment of temporary total disability payments; a letter from the Employer's carrier's representative to the Claimant, dated June 27, 2006, advising him that payment of benefits had been terminated; a copy of the Employer's Form LS-208, dated July 5, 2006, indicating the termination of benefits payments; and other correspondence, including copies of some of the medical reports from Dr. Isenberg and Dr. Rensimer summarized above. These documents establish the Employer paid the Claimant temporary total disability payments at the rate of \$1,047.16 per week from December 8, 2005 to June 29, 2006, a period of just over 29 weeks, and the Employer notified the District Director within seven days after its termination of benefits.

---

<sup>15</sup> One page of the exhibit, which reflects the Claimant's minimal pay in 2006, is missing from the Claimant's submission. The basis for any pay from the Employer to the Claimant in 2006 is not apparent from the record.

<sup>16</sup> The recommendation memorandum is missing from the Employer's submission.

### Injury Arising Out of Employment

Section 2(2) of the LHWCA, 33 U.S.C. § 902(2), defines an “injury” as an “accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury ...”. Section 20(a) provides a presumption that a claim comes within the provisions of the Act “in the absence of substantial evidence to the contrary.” To establish a prima facie claim for compensation, a claimant has the burden of establishing that: (1) the claimant sustained physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused, aggravated, or accelerated the harm or pain. Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Kier v. Bethlehem Steel Corp., 16 BRBS 128, 129 (1984). Once this prima facie case is established, a presumption is created under § 20(a) that the employee’s injury or death arose out of employment. A claimant’s subjective credible complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a prima facie case and the invocation of the § 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236, aff’d sub nom Sylvester v. Director, OWCP, 681 F.2d 359 (5<sup>th</sup> Cir. 1982).

In order to establish the second element, that is, to show that conditions at work could have caused, aggravated or accelerated the harm or pain, a claimant needs to show specifically that conditions existed at work that could have caused or aggravated the harm or pain. A claimant under the Defense Base Act must satisfy the same requirements to prove causation as any other claimant under the LHWCA. See Piceynski v. Dyncorp, 31 BRBS 559 (ALJ), remanded at BRB No. 97-1451 (July 17, 1998), reconsidered at 36 BRBS 134 (ALJ) (1999). In Defense Base Act cases, the “condition or course of employment” standard has been subsumed into the “zone of special danger” doctrine. O’Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504 (1951). As first enunciated by the Supreme Court: “The test of recovery is not a causal relationship between the nature of employment of the injured person and the accident [citation omitted]. Nor is it necessary that the employee be engaged at the time of the injury in activity of benefit to his employer. All that is required is that the ‘obligations or conditions’ of employment create the ‘zone of special danger’ out of which the injury arose. Id., at 506-07.

Recognizing that employees may be subjected to usual risks in foreign areas, the Benefits Review Board has extended the concept of a “zone of special danger” to encompass circumstances which increase the risk of physical injury or disability. Smith v. Board of Trustees, Southern Illinois University, 8 BRBS 197 (1978). “[T]he conditions of the employment place the employee in a foreign setting where he is exposed to dangerous conditions [...] [E]mployer can be said to create a zone of special danger by employing the employee in a foreign country.” Harris v. England Air Force Base, 23 BRBS 175, 179 (1990). If the conditions of employment create a zone of special danger out of which the injury arises, then a causal connection exists. See Ilaszczat v. Kalama Services, BRB No. 01-0774 (June 19, 2002).

Once the presumption is invoked, the burden of proof shifts to the Employer to rebut it with substantial countervailing evidence that the Claimant’s condition was not caused or aggravated by his employment conditions. Merrill v. Todd Pacific Shipyards Corp., 25 BRBS

140 (1991). The Benefits Review Board has held: “Unequivocal testimony of a physician that no relationship exists between the injury and claimant’s employment is sufficient to rebut the presumption.” Holmes v. Universal Maritime Serv. Corp., 29 BRBS 18, 20 (1995). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. Id. In such instance, the administrative law judge must weigh all of the evidence relevant to the causation issue. If the record evidence is evenly balanced, then the employer must prevail, because the claimant has not met the ultimate burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994).

## Discussion

The evidence of record clearly establishes that the Claimant has irritable bowel syndrome (IBS). All of the physicians who rendered opinions have stated that the Claimant has this medical condition. Therefore, I find that the Claimant has established the first element of a prima facie case.<sup>17</sup> Having observed the Claimant’s demeanor throughout the course of a three-hour hearing, I find that he is generally credible regarding his physical condition.

However, the evidence also suggests that after Dr. Kamionkowski had determined the Claimant was not medically fit for employment in Iraq, the Claimant appears to have taken action to ensure that the Employer’s medical expert, Dr. Isenberg, concurred in that conclusion. There appears to be no other reason why the Claimant would engage in a colloquy with Dr. Isenberg to tell him about “dismantling bombs” in Iraq. Nevertheless, whatever the motive for the Claimant’s act may have been, it does not call into question the validity of the conclusion that the Claimant has IBS.

As to the cause of the Claimant’s condition, the Employer asserts the cause of the Claimant’s IBS is undetermined, based on Dr. Rensimer’s report. Dr. Rensimer concluded the Claimant’s IBS was of unknown, possibly psychosomatic, origin, and opined that although it was possible that infectious agents could cause IBS, any such link was hypothetical. Dr. Rensimer also stated IBS can be a pre-existing condition, and he recommended a thorough investigation of the Claimant’s medical records.

However, two Board-certified gastroenterologists, Dr. Kamionkowski and Dr. Isenberg, have opined the Claimant’s IBS was most likely precipitated by an unknown infectious agent, citing the red and white blood cells that were present in the Claimant’s stool samples when he was tested in Iraq in November 2005. Dr. Rensimer had a copy of the military medical report in which red and white blood cells were found, but he did not discuss this finding.<sup>18</sup> Both Dr.

---

<sup>17</sup> Based on the evidence of record, I find that the Claimant’s IBS is an “injury” within the meaning of the LHWCA. See Powell v. Fluor Daniel Corp., BRB No. 97-0774 & 97-0774A (March 3, 1998). As will be discussed below, there is no evidence that the Claimant had IBS before his employment for the Employer. The medical evidence indicates the most likely cause of the Claimant’s IBS was an infectious agent. Although there is no specific evidence of which infectious agent may be responsible for the Claimant’s condition, the evidence indicates that the Claimant acquired it while he was employed for the Employer in Iraq.

<sup>18</sup> Dr. Rensimer was erroneously informed by the carrier’s representative that the tests were

Kamionkowski and Dr. Isenberg have stated that gastrointestinal infections can precipitate IBS. However, based on the negative results of the screening tests Dr. Kamionkowski administered, there has been no attempt to identify any specific infectious agent.

Based on the evidence of record, I find that the Employer is unable to rebut the § 20(a) presumption. Although the Employer's burden to rebut the initial presumption is not a great one, I find that the evidence the Employer has presented is insufficient to meet this low threshold. There is no evidence of record that the Claimant's IBS was present, before his employment with the Employer. Indeed, he was discharged from the military in April 2004 at the end of his regular enlistment, and he passed a physical examination, conducted by the Employer's representative, within 30 days of his deployment. Likewise, there is no evidence of record that the Claimant's IBS has a psychosomatic origin.<sup>19</sup>

The evidence of record indicates the Claimant was continuously in Iraq from the date of his arrival, in January 2005, to the date of his departure, in November of that year. There is no evidence the Claimant had any health problems between the time of his arrival in Iraq and the onset of his condition, in approximately June. In fact, although the Employer permitted its employees up to two weeks of unpaid leave after every 90 days in Iraq, there is no evidence that the Claimant left Iraq between his arrival there in January 2005 and the onset of his symptoms; similarly, there is no evidence that the Claimant left Iraq at any time between the onset of his symptoms and his departure from that country. Consequently, I find there is no evidence the Claimant acquired any infection, or came into contact with any infectious agent, before the commencement of his employment for the Employer, or in any context outside of his employment for the Employer. In making this finding, I presume that the entirety of the Claimant's time in Iraq in 2005 was related to his employment, and I note there is no evidence the Claimant left his work location inside Iraq at any time.<sup>20</sup>

Unquestionably, the Claimant experienced bouts of vomiting and diarrhea while in Iraq. This is verified by the deposition testimony of his former supervisor, Curtis Hightower. Although the evidence of the onset date of the Claimant's symptoms is somewhat vague, I find that the Claimant's illness preceded his departure from Iraq by several months. In addition to the Claimant's statements, the testimony of Mr. Hightower established the Claimant indeed had symptoms for several months before he was ordered to seek medical attention, in November 2005.

I find that, taken as a whole, the evidence establishes that the Claimant contracted IBS while in Iraq, and the Claimant's IBS is causally related to his employment for the Employer. In this regard, I take into consideration the fact that the Claimant was fed and housed at locations under the control of the Employer, and there is no evidence of any occasion where he left his

---

"normal;" however, his report reflects that he was provided a copy of the test results.

<sup>19</sup> I find no basis in the record for Dr. Rensimer's gratuitous comments regarding the Claimant's alleged personality deficit.

<sup>20</sup> As the evidence indicates, the security situation in Iraq during the Claimant's employment was precarious at best, and it would be extremely unlikely for the Claimant to leave the relative safety of his work location.

Employer's location. The Claimant spent many weeks in spartan field conditions, in an environment and climate to which he was not acclimated, necessitated by his work for the Employer.

I make no finding regarding the specific cause of the Claimant's IBS. It is possible, as the Claimant seems to allege, that his IBS developed as a consequence of eating spoiled food that was provided for him while deployed in a field environment as a consequence of his employment. However, there is no proof the Claimant's IBS arose because of any act or omission by the Employer. It is also possible the Claimant's IBS arose from contact with an infectious agent present in the air, the soil, or the vegetation to which the Claimant was exposed.

In assessing the evidence of record, and in particular weighing the physician opinions, I give more weight to the opinions of Dr. Kamionkowski and Dr. Isenberg than to that of Dr. Rensimer. I expect gastroenterologists such as Dr. Kamionkowski and Dr. Isenberg are more familiar with intestinal illnesses and conditions than Dr. Rensimer. I also expect gastroenterologists to be aware of emerging research regarding intestinal conditions. Both of the gastroenterologists stated it was possible that the Claimant's condition was precipitated by an unknown infectious agent. Both of them stated a general link between infectious agents and IBS has been established.

I would also expect Dr. Rensimer, as an infectious disease specialist, to be aware of new developments in his field, and so to assess whether there may be a link between an infection and the Claimant's IBS. However, I would also anticipate a physician with Dr. Rensimer's unique expertise to assess the possibility the Claimant may have been infected in Iraq by discussing the endemic infectious agents to which the Claimant may have been exposed. Instead of discussing the Claimant's condition by relating it to the experience of U.S. personnel in Iraq, Dr. Rensimer related the Claimant's condition to the overall population, and commented that IBS was a disease of the population at large.<sup>21</sup> While it may be true that IBS is a common disorder found in the general population, the general population does not have the exposures to which the Claimant was subjected in Iraq. Because Dr. Rensimer did not discuss the issue of the Claimant's condition in light of the Claimant's employment history, particularly when there is no evidence that the Claimant had IBS before his work for the Employer, I give it less weight.

Even though no specific causal connection between the Claimant's employment and his IBS can be identified, I find the Claimant's condition was caused by his employment based upon my conclusion that employment in a field environment in Iraq constitutes a "zone of special danger" for purpose of entitlement to disability benefits. See generally O'Leary v. Brown-Pacific Maxon Inc., 340 U.S. 504 (1951). Setting aside completely that the nature of the Claimant's work involved munitions handling, the evidence establishes a significant portion of the Claimant's work involved work under extreme conditions. In pertinent part, the Claimant's

---

<sup>21</sup> At the time of Dr. Rensimer's report, in 2006, a sizeable group existed for comparison: American forces and contractor personnel had been present for three years in Iraq, since the beginning of the current Iraq war in March 2003. Additionally, large numbers of U.S. troops were present in Iraq during the 1990-1991 Gulf war.

job description as an “ammunition handler – overseas location – Iraq” states: “Undertaking operations in Iraq will present unique operational challenges. These include potential threats from hostile forces, terrorist groups and disgruntles citizens, extreme climatic condition (sic), and the difficulties associated with conducting operations in a remote location” (CX 1/EX 2). The Claimant testified that when they were in a field environment, he and his team were protected by armed guards. He stated that travel to and from field sites involved the risk of encountering a roadside bomb (IED). Added to the external threats, the Claimant’s work environment at times involved hardships such as a lack of indoor shelter, bathrooms or latrines. Additionally, throughout Iraq, the Claimant had limited ability to leave his worksite and was basically tied to his work location.

Based on the foregoing, then, I find the Claimant has established, by a preponderance of evidence, that his medical condition, IBS, arose as a consequence of his employment for the Employer. Additionally, even assuming arguendo that the Employer has met his initial burden to rebut the § 20(a) presumption, I find the Claimant has nevertheless established the causal connection between his IBS and his employment.<sup>22</sup>

### Disability

Disability under the Act is defined as “incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment.” § 902(10). The claimant bears the initial burden of establishing a prima facie case of disability. Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial).

In order to establish a prima facie case of total disability under the Act, a claimant must establish that he can no longer perform his former job due to his job-related injury. Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339, 342-43 (1988). He need not establish that he cannot return to any employment, only that he cannot return to his former employment. Elliot v. C&P Telephone Co., 16 BRBS 89, 91 (1984). A doctor’s opinion that return to the employee’s usual work would aggravate his condition may support a finding of total disability. Care v. Washington Metro Area Transit Authority, 21 BRBS 248, 251 (1988). Once the claimant has established he cannot return to his usual work, he has established a prima facie case of disability, and the burden shifts to the employer to establish the availability of suitable alternate employment. Caudill v. Sea Tac Alaska Shipbuilding, 25 BRBS 92, 96 (1991), aff’d mem sub nom., Sea Tac Alaska Shipbuilding v. Director, OWCP, 8 F.3d 29 (9th Cir. 1993).

### Discussion

The conclusions of the three physicians who rendered opinions regarding the Claimant’s ability to continue to work for the Employer are summarized above. In brief, Dr. Rensimer

---

<sup>22</sup> Indeed, Dr. Rensimer states it is possible that an infectious agent caused the Claimant’s IBS. Consequently, I find this is not the “unequivocal testimony of a physician that no relationship exists between the injury and claimant’s employment.” See Holmes v. Universal Maritime Service Corp., 29 BRBS 18, 20 (1995).

stated the Claimant is fully capable to return to duty because his condition is at most a “medical annoyance,” easily controlled with diet, medications, and attention to fluid intake. After first concluding the Claimant was fully fit to return to his employment in Iraq, Dr. Isenberg opined, in September 2006, that the Claimant cannot return to his employment because of the danger to himself and others should he experience an attack of urgency when handling munitions. Dr. Kamionkowski was of the opinion that the Claimant cannot return to Iraq, partly due to his inferences about the danger of the Claimant’s job but also because of Dr. Kamionkowski’s conclusions regarding inherent stresses in that environment.

The circumstances under which Dr. Isenberg reversed his opinion regarding the Claimant’s fitness to return to work require discussion. The record reflects that in May 2006, the Claimant saw Dr. Isenberg, on behalf of the Employer, for an evaluation. In June, Dr. Isenberg opined the Claimant was fit to return to duty. As he testified at the hearing, after receiving notice from the Employer’s insurance carrier that his disability status would terminate, the Claimant contacted Dr. Isenberg. According to Dr. Isenberg’s later letter to the carrier, dated Sept 15, 2006, Dr. Isenberg reported that the Claimant told him he was still having symptoms of urgency and “he is concerned that if he has one of these urgent spells during one of his explosive ordinance (sic) disposal jobs this could be very dangerous” (CX 5/EX 5). Dr. Isenberg repeated this conclusion in a second letter, dated January 2007.

The Claimant has given at least two versions of his conversation with Dr. Isenberg. At the hearing, he denied telling the doctor he dismantled bombs, and also asserted, if Dr. Isenberg concluded that the job entailed dismantling live ammunition, Dr. Isenberg must have misunderstood him (T. at 62). However, in his deposition testimony, the Claimant admitted he told Dr. Isenberg his team took bombs apart and destroyed enemy caches of ammunition, and that he also told Dr. Isenberg he would not feel comfortable handling some of the ordnance because of his explosive diarrhea (EX 18 at 80-83).

I find it unlikely Dr. Isenberg would have inferred the Claimant’s job as an ammunition handler was inherently dangerous unless the Claimant told him it was. I also find it unlikely Dr. Isenberg would infer that the Claimant was unable to return to work because of the chance that an episode of urgency would create danger for himself or others unless the Claimant told him that. Consequently, I find it likely that the Claimant did express to Dr. Isenberg a concern that an “urgent spell” could be dangerous.

The Employer has established the Claimant’s job does not involve dismantling bombs. As both the Claimant and Mr. Hightower testified, the Claimant’s job often included “sweeping” an area to identify the nature and location of the munitions, prior to gathering and detonating them. This does entail some risk and requires concentration, as Mr. Hightower stated. Based on the testimony of Curtis Hightower, the Claimant’s former supervisor, the Employer established it was not the Claimant’s responsibility to handle unstable or dangerous munitions, and the Claimant was not supposed to touch any munitions unless he has been cleared to do so by a technician. The Claimant claimed all the members on his team on occasion would move munitions without clearance from technicians. Based on the testimony of Curtis Hightower, I find the Employer instituted procedures to minimize the risk to the ammunition handlers by requiring them to work under the direction of trained technicians. It certainly was possible, as

Mr. Hightower has conceded, that the Claimant and his co-workers disregarded these rules, at least on occasion. However, I find no evidence the Employer encouraged its employees to flout its established procedures.

I discount Dr. Isenberg's later opinion because it is influenced by his erroneous assumption regarding the nature of the Claimant's work. Based on the record before me, I find the Claimant was not involved in "dismantling bombs," as Dr. Isenberg apparently presumed. Moreover, Dr. Isenberg's opinion does not address the issue of the Claimant's ability to work under the harsh conditions his job in Iraq required. Consequently, whatever the specific nature of the Claimant's job duties, I find Dr. Isenberg's opinion to be not at all helpful in determining whether the Claimant is currently able to perform his job for the Employer.

Dr. Rensimer dismissed the idea that the Claimant is disabled from returning to his job for the Employer. Even considering the fact that the Claimant's job as an ammunition handler in Iraq, Dr. Rensimer stated this condition was a medical annoyance and should not impact on the Claimant's ability to work. He remarked: "even in remote location work, adequate fluid support and readily available supplies of toilet paper will make him fit to work." I give Dr. Rensimer's opinion little weight, because Dr. Rensimer is not a gastroenterologist, and does not have the experience of a gastroenterologist regarding how a patient can manage an IBS condition. Notably, Dr. Kamionkowski, who is a gastroenterologist, disagreed with Dr. Rensimer, and stated the Claimant's IBS was a serious issue which could not readily be corrected with ample supplies of water; Dr. Kamionkowski also noted that water may not be readily available in Iraq.

Dr. Kamionkowski's written opinions and his deposition testimony reflect that, similar to Dr. Isenberg, he presumed the Claimant was involved in dismantling active munitions. However, that was not the sole basis for his opinion the Claimant was not able to work as an ammunition handler in Iraq. Dr. Kamionkowski concluded it was not the nature of the Claimant's job, but the nature of his physical condition, in light of the inherent stresses of work in Iraq, that precluded his return to work. Dr. Kamionkowski characterized the Claimant's IBS as a "benign nuisance" in normal circumstances (CX 4/EX 4). However, he stated in his deposition testimony that people with irritable colons have "a very finicky digestive system" and it is therefore helpful for an IBS patient to avoid environmentally stressful situations if at all possible. As Dr. Kamionkowski remarked: "I just think the kind of work that he was designated to do in Iraq, under the conditions that people are living in Iraq today, I don't think that's the environment for somebody with an irritable colon. Whether it's blowing up ammunitions (sic) or just to stay at the Hilton Hotel in Baghdad, that's not the place to be" (CX 9A/EX 14 at 48). Dr. Kamionkowski also remarked: "I would definitely advise this guy to stay away from Iraq until this [the IBS] is all settled" (CX 9A/EX 14 at 51).

There is no question that the Claimant's work in Iraq was, of necessity, conducted under stressful and difficult living conditions, in remote locations. In addition, although all of the physicians mentioned that control of diet was helpful to someone with IBS, none of the physicians specifically addressed the issue that the Claimant, if deployed in a field environment in Iraq, would have little control over his diet.

Based on the foregoing, I find the Claimant has established that, based upon his medical condition, he is disabled from his current employment in Iraq. Unfortunately, the circumstances of life in Iraq are not normal, and due to his IBS condition, the Claimant is unable to function in that environment. However, based upon the opinions of Dr. Isenberg and Dr. Kamionkowski, I find the record does not establish that the Claimant is disabled from employment as an ammunition handler in locations other than Iraq. I also note that the Claimant is not disabled from any employment in his current place of residence.

#### Maximum Medical Improvement

The Act does not provide standards to distinguish between classifications or degrees of disability. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Care v. Washington Metro Area Transit Authority, 21 BRBS 248, 251 (1988).

The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI). The determination of when MMI is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. Seidel v. General Dynamics Corp., 22 BRBS 403, 407 (1989); Stevens v. Lockheed Shipbuilding Co., 22 BRBS 155, 157 (1989). Any disability before reaching maximum medical improvement is considered temporary in nature. See Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231, 234 (1984).

In this case, the parties have stipulated that the Claimant has not reached MMI. I find the record as a whole supports this stipulation. The medical opinion evidence before me indicates it is unknown when the Claimant will overcome completely his current medical impairment.<sup>23</sup>

#### Alternative Employment

Once a prima facie case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. Clophus v. Amoco Prod. Co., 21 BRBS 261, 265 (1988). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. Palombo v. Director, OWCP, 937 F.2d 70, 73 (2d Cir. 1991); Rinaldi v. General Dynamics Corp., 25 BRBS 128, 131 (1991). Suitable alternative employment must take into consideration factors such as the relevant labor market, the Claimant's educational background and skills, and the Claimant's physical limitations based on his disability. American Stevedores v. Salzano, 538 F.2d 933 (2d Cir. 1976), aff'd 2 BRBS 178 (1975).

---

<sup>23</sup> Presuming he does overcome his impairment, and is medically cleared to work in the austere environment of a field location in Iraq, then the Claimant will no longer be disabled, and he will be able to resume his prior employment, either for the Employer or for a similar company.

## Vocational Evidence and Suitable Alternative Employment

### Gerald Wells, Ph.D (EX 10, 11A)

The Employer submitted a labor market survey from Gerald Wells, Ph.D., a certified rehabilitation counselor, dated March 27, 2007. Dr. Wells examined the personnel and medical records summarized above, and all of the deposition testimony admitted in this proceeding. He also interviewed the Claimant, on February 9, 2007. In his report, Dr. Wells examined employment available in the employment market of Akron, Ohio (near the Claimant's current residence), as well as the national and international labor markets.

Dr. Wells summarized the Claimant's employment for the Employer as "unskilled, laboring type work." According to Dr. Wells, the Claimant told him that he would like to return to the kind of work he was doing for the Employer, even if it was not in Iraq. The Claimant's thoughts about other types of work were limited by his concerns about his medical condition. The Claimant told Dr. Wells that he was not comfortable being in public unless he has access to a bathroom, and is not comfortable being away from a bathroom at any time.

In Dr. Wells' assessment, the Claimant has no specific transferable skills from his prior employment or his military service. However, from his military service, the Claimant has adaptive skills such as self-discipline, the ability to get along with others, reliability, and the ability to work independently. In addition, based on Dr. Kamionkowski's and Dr. Isenberg's assessments, Dr. Wells concluded that the Claimant may have work restrictions that require him to use bathroom facilities four to five times a day, but his restrictions would not preclude him from working altogether.

Dr. Wells compiled a listing of jobs with enough flexibility to be performed within the restrictions mentioned by Dr. Kamionkowski and Dr. Isenberg. These jobs are open and available to an individual with limited vocational skills. Although most of the jobs require some training, the training is provided at the employer's cost. The jobs included security officer, with a starting pay of \$8.00 to \$11.00 per hour; Transportation Security Administration airport screener, beginning at \$13.10 per hour; sales positions paying from \$26,000 per year and higher; Ohio State highway patrolman at \$46,000 to \$50,000 per year; and truck driver at \$1,000 per week. Dr. Wells also identified a general laborer position with a defense contractor in New Jersey at \$13.74 per hour, and a position as a field support person collecting geophysical data in supported of unexploded ordnance geophysical investigations in the United States, with a starting pay of \$16.00 per hour.

According to Dr. Wells, positions for unexploded ordnance technicians are available, at wages of approximately \$20.00 per hour; however, the Claimant does not have the specific educational background in ordnance demolition to qualify for many of these jobs. Overseas, Dr. Wells reported, most unskilled labor jobs are filled by local residents. He was unable to locate any open and available positions for ammunition handlers.

In an addendum to his initial report, dated May 26, 2007, Dr. Wells provided information about security/force protection jobs overseas in Kuwait. These positions pay between \$16.00

and \$22.00 per hour, in 12 hour shifts, plus hazard pay, which ranges from 20% to 50% of the hourly wage. There is a possibility for overtime pay. According to Dr. Wells, the annual wage for these positions is between \$50,000 and \$68,000. Dr. Wells provided no information regarding the availability of these positions. Nor did he provide any information about the physical environment in Kuwait. It is uncertain, therefore, whether the working conditions (field work, remote sites, etc.) are similar to those the Claimant experienced in Iraq.

## Discussion

The Employer is required to show that jobs for the Claimant are available in the “local community.” “Local community” has been interpreted to comprise the area in which the Claimant was working at the time of the injury. See Palombo v. Director, OWCP, 937 F.2d 70 (2d Cir. 1991). However, as noted above, I have found the Claimant is, at present, disabled from any employment in Iraq. The Claimant has relocated to Ohio, which was his home before his employment for the Employer. I find, therefore, that it is appropriate to consider the area in which the Claimant currently resides as the “local area” for purposes of job availability. See See v. Washington Area Metropolitan Transportation Authority, 36 F.3d 375 (4th Cir. 1994). Although the Employer has provided information about jobs in other areas of the United States, I am aware of no authority that requires me to consider those opportunities as suitable alternate employment for the Claimant.

Although the Employer has identified a wide variety of employment options, I do not consider that all of these are suitable for the Claimant. Based upon the Claimant’s anxiety about being away from bathroom facilities, which I find to be understandable because of his IBS condition, positions that require him to spend long periods of time in a vehicle are not appropriate. Therefore, the positions as a highway patrol officer and truck driver are not suitable. It is unclear whether the positions in Kuwait are suitable, because no information about the physical environment in which the Claimant would be expected to work is provided. In addition, it is unclear whether someone with IBS would be accepted for these positions.

However, I find that several of the positions the Employer identified are suitable for the Claimant, and are available in the local area. These are: airport screener (\$13.10 per hour to start); automobile sales (\$500.00 per week during training period); computer applications sales (\$26,000 per year). All of these positions pay approximately \$500.00 per week. I find, therefore, that suitable alternative work is available for the Claimant at a wage of \$500.00 per week. Consequently, then, I find this constitutes the Claimant’s current wage-earning capacity.

Dr. Wells’s report is addressed to the Employer’s counsel and is dated March 27, 2007. It was forwarded to me on April 24, 2007, and a copy was provided to the Claimant’s counsel at the same time. In the absence of any evidence indicating that the Claimant received information regarding suitable alternate employment prior to the transmission of the report to his counsel, I will presume the Claimant received the report on April 30, 2007, the same day I received it. As of this date, therefore, the Claimant’s total disability becomes a partial disability. As noted above, because the Claimant has not reached maximum medical improvement, his disability is a temporary partial disability.

### Average Weekly Wage

Compensation for temporary partial disability is based on the difference between the claimant's pre-injury average weekly wage and post-injury wage earning capacity. Section 908(e) states: "In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be two-thirds of the difference between the injured employee's average weekly wages before the injury and his wage-earning capacity after the injury in the same or another employment, to be paid during the continuance of such disability ...." Under § 906(b)(1), the maximum amount of disability compensation payable is 200% of the applicable national average weekly wage, as determined by the Secretary of the Department of Labor. For the period between October 1, 2005 and September 30, 2006, the maximum amount is \$1,073.64.

In § 10, the Act sets forth the methods to determine a claimant's average annual earnings, in pertinent part, as follows:

- (a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.
- (b) If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings, if a six-day worker, shall consist of three hundred times the average daily wage or salary, and, if a five-day worker, two hundred and sixty times the average daily wage or salary, which an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.
- (c) If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

As discussed above, the Claimant worked for the Employer in Iraq from January 8, 2005 through late November, 2005.<sup>24</sup> The Claimant's employment offer stated that he would work six days per week (CX 1/EX 2). In addition to the testimony summarized above about the starting and ending days of his work for the Employer, the Claimant testified he calculated that he

---

<sup>24</sup> He also worked for the Employer for approximately one week prior to his arrival in Iraq.

worked 276 days for the Employer (T. at 74). Although the Claimant did not work the 300 days which are used to calculate the annual earnings of a six-day worker under § 10(a), he exceeded the number of work days anticipated from a worker working five days per week for a full year, and worked more than 90% of the days required for a six-day a week worker in a full year. Under such circumstances, I find that the 276 days that the Claimant worked for the Employer are sufficient to qualify as “substantially the whole of a year.”<sup>25</sup>

During his employment for the Employer, the Claimant earned a total of \$126,098.51, which includes \$112,098.51 in wages, and \$14,000.00 of personal pension contributions.<sup>26</sup> The Claimant appears to advocate § 10(a) be used to calculate the average weekly wage, as he proposes that the Claimant’s benefits be based on the fact that the Claimant “worked for almost a year [in Iraq] for the employer and earned over \$126,000.” Claimant’s brief.<sup>27</sup> In contrast, the Employer advocates that, pursuant to § 10(c), I use my discretion to determine an appropriate wage. The Employer asserts §§ 10(a) and (b) cannot be “fairly” and “reasonably” applied, because the Claimant’s wages paid by the Employer “were plainly, by any measure, extraordinary and absolutely atypical given his age, education, work experience and prior earnings history,” and therefore represent a “spike” in his earning capacity, due to the “exigencies of wartime employment that never was anticipated by anyone to be permanent in nature.” Employer’s brief at 54-55. Neither party asserts § 10(b) should be used.

Section 10(c) permits discretion in determining a “reasonable” average weekly wage for a claimant when neither §§ 10(a) nor (b) can be reasonably and fairly be applied. Essentially, the Employer argues § 10(a) cannot be reasonably and fairly applied because: 1) the Claimant’s employment in Iraq was “unquestionably temporary;” 2) although the Claimant may have desired to pursue a “career” as an ammunition handler, there was “no evidence that Ammunitions Handlers...could expect to find such work available on a continuing basis;” and 3) the Claimant’s wages were “through the roof” compared to his previous earnings, or his “pre-deployment income was clearly not even ‘in the ballpark’ in comparison to his overseas earnings.”

Unlike §§ 10(a) and 10(b), § 10(c) contains no requirement that the previous earnings considered be within the year immediately preceding the injury. Anderson v. Todd Shipyards, 13 BRBS 593, 596 (1981). In calculating annual earning capacity under Section 10(c), I may consider: the actual earnings of the claimant at the time of injury; the average annual earnings of others; the earning pattern of the claimant over a period of years prior to the injury; the claimant's typical wage rate multiplied by a time variable; all sources of income including earnings from other employment in the year preceding injury, overtime, vacation or holiday pay, and commissions; the probable future earnings of the claimant; or any fair and reasonable

---

<sup>25</sup> Moreover, as Mr. Hightower’s testimony indicates, had he as the supervisor not intervened and directed the Claimant to seek medical attention, the Claimant would have likely continued to work for the Employer for the foreseeable future.

<sup>26</sup> A claimant’s allocation of his earnings to a 401(k) plan qualifies as a wage. Cretan v. Bethlehem Steel Corp., 24 BRBS 35, 43 (1990). Therefore, the Employer’s contention, that the Claimant’s pension contributions should not be included in calculating his wage, is erroneous.

<sup>27</sup> The Claimant’s brief is not paginated.

alternative. I must arrive at a figure that approximates an entire year of work (the average annual earnings). That figure is then divided by 52 to arrive at the average weekly wage. § 10(d); Wayland v. Moore Dry Dock, 25 BRBS 53, 59 (1991); Brien v. Precision Valve/Bayley Marine, 23 BRBS 207, 211 (1990).

The record establishes that the Claimant worked for the Employer “in the employment in which he was working at the time of the injury” during the period of his employment in Iraq. See § 10(a). He performed this work from the beginning of January through the latter part of November, which I have found is “substantially the whole of the year immediately preceding his injury.” Id.

The Claimant’s pay records do not specifically reflect the number of days he worked. The evidence of record indicates that the Claimant worked from early January 2005 to late November of that year, a period of approximately 47 weeks. Presuming that the Claimant worked six days per week and a total of 276 days, he worked approximately 46 weeks. However, the record also reflects that the Claimant testified that he occasionally took days off when he was sick, and he was not paid for those days (T. at 115). Consequently, I find the Claimant’s statement that he worked for 276 days for the Employer is essentially accurate. In the absence of any evidence contradicting this figure, I will use it to calculate the Claimant’s average weekly wage.<sup>28</sup>

To calculate average weekly wage under § 10(a), the claimant's actual earnings for the 52 weeks prior to the injury are divided by the number of days he actually worked during that period, to determine an average daily wage. Then the average daily wage is multiplied by 300 for a six-day worker or 260 for a five-day worker, and the product is divided by 52, pursuant to § 10(d), to determine the average weekly wage. Applying this formula, the Claimant’s total wages of \$126,098.51 are divided by 276, to obtain a daily wage of \$456.88. This figure is multiplied by 300, which nets a total of \$137,063; this figure divided by 52 nets an amount of \$2,635.84 as the Claimant’s average weekly wage.

In the recently decided case of Proffitt v. Service Employers International, Inc., BRB No. 06-0306 (Aug. 14, 2006), the Benefits Review Board (“Board”) addressed issues concerning applicable wages for defense contractor employees in Iraq. In Proffitt, the claimant was injured in Iraq after working for the employer there for between three and four months. The employment contract stated that there was “no minimum guaranteed duration of employment.” Id. at 7. In the several months prior to his work for the employer in Iraq, the claimant worked as a laborer and maintenance worker in the United States. Id. at 4. The administrative law judge found that the claimant’s wages in Iraq “represented a 322 percent increase over his salary in the United States.” Id. at 7. On appeal, the Board made several findings. First, on the issue of the temporary nature of wartime work, the Board held that “while claimant’s employment in Iraq was not necessarily intended to be long-term, claimant’s injury cost him the ability and

---

<sup>28</sup> The Claimant testified that he was not regularly employed between his discharge from the Marine Corps in early 2004 and his employment for the Employer (EX 18 at 52-53). Therefore, I used only the Claimant’s wages for the Employer in this calculation, and considered no income from 2004.

opportunity to earn higher wages for at least the rest of his contract term.” Id. Second, on the significance of whether a claimant could continue to find similar work on a continuing basis, the Board held that “post-injury events, such as decreased work opportunities or wages, generally are irrelevant to the calculation of a claimant’s average weekly wage.” Id. Finally, the Board rejected the argument that relying only on a claimant’s wages in Iraq was unreasonable because such focus was only a “snapshot” of the Claimant’s wages, and “not representative of claimant’s actual wage-earning capacity.” Id. Instead, pursuant to § 10(c), the Board affirmed the use of the claimant’s fifteen weeks of wages earned in Iraq as the basis for the average weekly wage, because this amount “reflect[ed] the increase in pay claimant received when he commenced working for employer in Iraq.” Id.

As in Proffitt, the Claimant in this case received an enormous increase in earnings when he commenced working for a defense contractor in Iraq. Although the Claimant in the instant case had no set contract term, the Employer’s offer indicated that the employment was open-ended. As the Claimant testified, the Employer eventually lost its contract with the government, but all of its employees were offered positions with the successor contractor (T. at 118-19). Although there is no evidence in the record regarding the wages paid by a successor contractor, it is probable that the successor pay rate was similar to the Employer’s.

The object of § 10(c) is to arrive at a sum that reasonably represents a claimant’s annual earning capacity at the time of his injury. Story v. Navy Exchange Service Center, 33 BRBS 111 (1999). As Proffitt recognizes, the purpose of compensation is to replace a claimant’s lost earnings capacity. See Hastings v. Earth Satellite Corp., 628 F.2d 85, 14 BRBS 345 (D.C. Cir. 1980), cert. denied, 449 U.S. 905 (1980). In the instant case, the Claimant’s condition cost him the ability to earn exceptionally high wages, because it prevents him from continuing to work in Iraq.

I know of no authority that permits me to use § 10(c) to obtain a lower compensation rate in cases where an employer contends that the claimant’s average weekly wage, which the employer paid for substantially a full year, is not an adequate measure of a claimant’s earning capacity. The Employer cites several cases in support of its contention that the wages it paid the Claimant represented an aberration in his earning capacity. See e.g., Goldbach v. Service Employers Int’l, No. 2003-LHC-02681 (Sept. 21, 2004)(ALJ); Fern v. Service Employers Int’l, No. 2003-LDA-46 (Dec. 8, 2005)(ALJ); Stoessell v. Brown & root, Inc., No. 2002-LHC-49 (Feb. 20, 2003)(ALJ). I agree with the Employer that the wages it paid the Claimant were “aberrational” in that they were significantly higher than the wages he earned from any employment before he began work for the Employer. However, the Employer has presented no evidence that the wages it paid the Claimant are aberrational, based upon the type of job he was performing for the Employer, the locale in which he was working, and the number of hours per week he worked.

The cases the Employer cites represent instances where administrative law judges have used a “blended” approach, combining a claimant’s overseas and domestic wages to derive an average weekly wage. However, in general these cases concern circumstances where § 10(a) is not appropriate because the claimant did not work “substantially the whole of the year;” indeed, in the cases the Employer cites, the claimants worked anywhere from several days to several

weeks prior to injury, and in most instances had a history of employment in jobs similar to those in which they were employed at the time of their injuries. In contrast, the Claimant in this case worked almost a full year for the Employer and, except for his military service, had no prior experience in ammunition handling. In addition, the Claimant's work, though unskilled, was highly specific to Iraq. Consequently, his inability to work in Iraq due to his condition necessarily entailed a significant diminution in his earning capacity.

It is apparently a common practice for employers to pay extremely high wages to workers willing to work in Iraq. See, e.g., Zimmerman v. Service Employers Int'l, BRB No. 05-0580 (Feb. 22, 2006). When these workers are injured as a result of their employment they may be unable to work in Iraq any longer; in such instances, these individuals lose significant wage-earning capacity. Under the governing statute, they must be compensated adequately for their lost earning capacity.

As noted above, I have found that the Claimant worked for the Employer for "substantially the whole of the year immediately preceding his injury." I find that none of the circumstances asserted by the Employer warrant departure from the § 10(a) standard. Consequently, I find that § 10(a) may indeed be reasonably and fairly applied.

#### Future Medical Treatment

Section 7(b) of the Act authorizes the Secretary through his designees to oversee the provision of health care. § 907(b); see 20 CFR § 702.407. Administrative Law Judges have authority to order payment for medical expenses already incurred, and generally to order future medical treatment for a work-related injury. The record in this case indicates that the Employer has paid the medical expenses incurred by the Claimant to date. The record also indicates that the Claimant is not currently under active medical treatment for his IBS. Based on the record, it may be appropriate for the Claimant to obtain further medical treatment for this condition, in order that he may reach maximum medical improvement. The Employer shall be responsible for the reasonable costs of such treatment.

#### Attorney's Fees

Having successfully established the Claimant's right to compensation, the Claimant's attorney is entitled to an award of fees under § 28(a) of the Act. The regulations address attorney's fees at 20 CFR §§ 702.132–135. The Claimant's attorney has not yet filed an application for attorney's fees. The Claimant's attorney is hereby allowed thirty (30) days to file an application for fees. A service sheet showing that service has been made upon all parties, including the Claimant, must accompany the application. The parties have ten days following service of the application within which to file any objections. The Act prohibits the charging of a fee in the absence of an approved application.

#### Conclusion

In summary, I conclude that the Claimant is totally disabled from his work for the Employer, up to April 30, 2007, the date of notification of alternative employment. Thereafter,

commencing May 1, 2007, and continuing until the Claimant reaches Maximum Medical Improvement, the Claimant has a temporary partial disability. The Claimant shall be paid for his temporary disability, based upon his average weekly wage during his employment for the Employer of \$2,635.84 and his alternate earning capacity of \$500.00 per week.

### ORDER

The claim for benefits filed by the Claimant is GRANTED. I therefore ORDER:

1. The Employer shall pay temporary total disability compensation to the Claimant for the period from December 8, 2005, to April 30, 2007, based on an average weekly wage of \$2,635.84, in accordance with § 8(b) of the LHWCA, 33 U.S.C. § 908(b). Employer shall receive a credit for amounts paid from December 8, 2005 through June 29, 2006.<sup>29</sup>

2. Commencing May 1, 2007 and continuing, the Employer shall pay temporary partial disability compensation to the Claimant, based on an average weekly wage of \$2,635.84, and an alternate earning capacity of \$500.00 per week, in accordance with § 8(e) of the Act, 33 U.S.C. § 908(e).

3. The Claimant is entitled to interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated in accordance with 28 U.S.C. § 1961.

4. The District Director shall make all calculations necessary to carry out this order.

5. Employer shall pay the Claimant for all future reasonable and necessary medical care and treatment arising out of his work-related illness, pursuant to § 7(a) of the Act, 33 U.S.C. § 907(a).

6. The Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy on the Employer and opposing counsel, who shall have ten (10) days to file any objections.

A

Adele H. Odegard  
Administrative Law Judge

Cherry Hill, New Jersey

---

<sup>29</sup> Based upon the record, it appears that the Employer paid the Claimant at the rate of \$1,047.16, and not the proper rate for fiscal year 2006 of \$1,073.64 (EX 1).